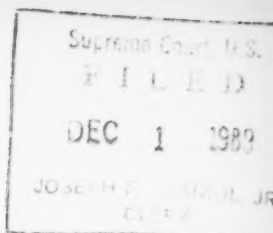


89-904

No.



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

Carl Michael Forrester, Sr.,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

C. RICHARD GRIESER
RICHARD D. WELCH
GRIESER, SCHAFFER, BLUMENSTIEL &
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COUNSEL FOR PETITIONER

6944



PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

The petitioner, Carl Michael Forrester, Sr., prays that a Writ of Certiorari be issued to review the decision of the Supreme Court of Ohio in his case or, if this Court determines that The Ohio Supreme Court's dismissal of petitioner's appeal was not a decision on the merits, then, in the alternative petitioner prays that a Writ of Certiorari be issued to review the decision of The Court of Appeals for Morgan County, Ohio, Fifth Appellate District.

QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE

IN A CASE INVOLVING A STATE FELONY DOES A STATE TRIAL COURT ERR AND VIOLATE A DEFENDANT'S CONSTITUTIONAL RIGHT UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION TO STAND TRIAL ONLY ON A PROPERLY FOUND INDICTMENT RETURNED BY A GRAND JURY, WHEN OVER DEFENDANT'S OBJECTIONS, THE COURT ALLOWS THE PROSECUTOR TO AMEND THE



INDICTMENT AT TRIAL AND ADD AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGED. TO WIT: THE MENS REA ELEMENT OF RECKLESSNESS WHERE (1) SUCH ELEMENT HAD NOT BEEN PRESENTED TO THE GRAND JURY AS AN ESSENTIAL ELEMENT OF THE CHARGED CRIME AND (2) THAT ESSENTIAL ELEMENT WAS NOT FOUND BY AND WAS NOT RETURNED BY THE GRAND JURY IN ITS INDICTMENT?

QUESTION TWO

IN A CASE INVOLVING A STATE FELONY, DOES A STATE TRIAL COURT ERR AND VIOLATE A DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION TO A FAIR TRIAL AND CONFRONTATION OF WITNESSES AGAINST HIM, WHEN IT DENIES HIS REQUEST FOR THE TRANSCRIPTION OF AND PRODUCTION OF THE STATE'S KEY WITNESS' PRIOR GRAND JURY TESTIMONY FOR AN IN-CAMERA INSPECTION BY ALL PARTIES AFTER THE WITNESSES DIRECT TESTIMONY AT TRIAL AND JUST PRIOR TO CROSS-EXAMINATION BY DEFENDANT'S COUNSEL, ESPECIALLY WHERE THE NEED FOR GRAND JURY SECRECY HAS BEEN RENDERED MOOT AND A PARTICULARIZED NEED HAS BEEN ARTICULABLY SHOWN?



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OHIO

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MISCELLANEOUS

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Ohio Rules of Criminal Procedure:

RCr 7 (D) 8.15RCr 16 (C) (1) (d) 9



OPINIONS BELOW

No written opinion was rendered by the Morgan County, Ohio Court of Common Pleas. Following a jury trial, Petitioner was convicted of Endangering Children [O.R.C. 2919.22 (B)(3)] (Appendix E) and Involuntary Manslaughter [O.R.C. 2903.04 (A)] on March 23, 1988. On March 30, 1988, the Morgan County Court of Common Pleas entered final judgment and Defendant was sentenced to imprisonment for a minimum of five (5) years and a maximum of twenty five (25) years. (Appendix A & B).

Both counts of indictment are set forth in Appendix F.

By opinion rendered June 21, 1989, the Ohio Court of Appeals for the Fifth Appellate District affirmed Petitioner's conviction. (Appendix C).

By order of October 4, 1989, the Ohio Supreme Court dismissed Petitioner's



appeal stating that no substantial constitutional question existed. (Appendix D). The case was styled STATE OF OHIO V. CARL MICHAEL FORRESTER, SR., Case No. 89-1458. There was no published opinion.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(a). The Ohio Supreme Court dismissed Petitioner's Appeal of his conviction on October 4, 1989. This petition is, therefore, timely filed pursuant to Sup.Ct.R. 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT

No person shall be held to answer for a capital case or otherwise infamous crime unless on a presentment or indictment of a Grand Jury.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and



to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.

STATEMENT OF THE CASE

Carl Michael Forrester, Sr. was indicted by the Morgan County, Ohio Grand Jury for Involuntary Manslaughter and Child Endangering as a result of an incident which occurred on December 27, 1986 wherein petitioner, at his residence, according to his testimony, found his infant son, Carl Michael Forrester, Jr., not breathing and while attempting to resuscitate him is alleged to have caused his son's death.

Trial commenced on March 21, 1988.

In pre-trial discovery, Petitioner's counsel had requested that the Court order the transcription and production of the Grand Jury testimony of all witnesses who testified at that proceeding that were also going to testify at trial, both for counsel's pre-trial preparation of the defense and for in-camera inspection and proposed use at trial during the cross-examination of the State's witnesses, after the witness' direct testimony.

Petitioner's counsel argued that there was no issue of secrecy to prevent the production since the only transcripts to be produced would be of those witnesses who were going to appear at trial and that a particularized need existed inasmuch as:

- a) this case involved peculiar medical and factual issues as to the cause of death;



b) that there was a defect in the indictment which suggested a need to examine the Grand Jury transcripts to see if exculpatory material existed; and

c) that petitioner was entitled to view the prior recorded testimony for cross-examination and impeachment or corroboration purposes.

The Court denied petitioner's request, except that, the Court allowed the production of the Grand Jury testimony of the State's chief medical witness to be produced, stating that defendant had demonstrated a particularized need.

Just prior to trial, petitioner's counsel also moved for a dismissal of the single page, two-count indictment on the basis that Count Two, (Appendix F), was defective since it failed to include the mens rea element of "recklessness" as an essential element of the charge of "Child



Endangering" in Count II of the indictment. The Court denied petitioner's motion to dismiss on the authority of State v. O'Brien, 30 Ohio St. 3d. 122 (1987) and allowed the prosecution to amend the indictment, at trial, to add the element of recklessness.

Trial proceeded and petitioner was convicted on both counts of the indictment on March 23, 1988. On June 8, 1988, petitioner was sentenced to imprisonment for a period of five (5) to twenty-five (25) years.

A timely appeal was taken, as a matter of right, to the Fifth District Court of Appeals. On appeal, petitioner raised seven (7) assignments of error, including the two questions presented.

In the Ohio appellate court, petitioner maintained that the trial court erred when it allowed the prosecution to amend at the trial the charge of Child



Endangering in the indictment to add the essential mens rea element of "recklessness" and that this error violated Petitioner's guaranteed rights pursuant to the Fifth Amendment of The United States Constitution and Article I, Section 10 of The Ohio Constitution to stand trial only on a proper indictment lawfully returned by a Grand Jury.

Petitioner urged, on the authority of State v. O'Brien, 30 Ohio St. 3d. 122 (1987) that since recklessness was an essential element of the crime of Child Endangering, it, therefore, should have been considered by the Grand Jury who found the indictment and failure to have so found altered the indictment so substantially and rendered it so defective that it should have been dismissed upon petitioner's motion. The State argued that O'Brien, supra allowed the amendment to the indictment to be made at trial,



pursuant to Rule 7(D) of The Ohio Rules of Criminal Procedure. (Appendix H).

Petitioner also maintained that the trial court erred and violated his rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution to confront witnesses and to due process of law by refusing to order the transcription and production at trial of prior Grand Jury testimony of the State's key witnesses for purposes of petitioner's cross-examination of the same. Petitioner urged that the need to preserve the secrecy of the Grand Jury proceedings was non-existent in the case where the proceeding had ended and the same witnesses were going to testify openly at the trial. Further, petitioner argued that he had shown a particularized need for the transcripts based upon his right to effective cross-examination; the special medical and factual issues this case presented;



and, the fact that there appeared to be an improper Grand Jury proceeding as evidenced by their returning an indictment that was defective.

Petitioner urged the Court to apply the holding in State v. Daniels, 1 Ohio St. 3d. 69 (1982) which provided for an in-camera inspection of producible out-of-court witness' statements upon request by defense counsel after a witness's direct testimony as required by Rule 16 of The Ohio Rules of Criminal Procedure, (Appendix H), to the production of a witness's prior testimony to the Grand Jury.

In a published opinion on June 21, 1989 the Fifth District Court of Appeals affirmed the trial court's judgment of petitioner's conviction. Without discussion, the Court overruled petitioner's contention concerning the failure of the trial court to dismiss the defective indictment on the authority of State v.



O'Brien, supra. The appellate court also overruled Petitioner's assignment of error regarding the requested Grand Jury testimony stating that "appellant (petitioner) demonstrated no particularized need" pursuant to State v. Greer, 66 Ohio St. 2d 139 (1981).

Petitioner timely sought leave to appeal to and review by the Ohio Supreme Court who, on October 4, 1989, dismissed the appeal stating that no substantial constitutional question was presented. Therein, the judgment of the trial court and the appellate court's affirmance of the judgment was final.

ARGUMENT IN SUPPORT OF
ISSUANCE OF THE WRIT

A. SUMMARY

This case presents two very important questions of federal constitutional magnitude.

1. The first question is whether an

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THE SECOND QUESTION IS WHETHER

THE THIRD QUESTION IS WHETHER

THE FOURTH QUESTION IS WHETHER

THE FIFTH QUESTION IS WHETHER

THE SIXTH QUESTION IS WHETHER

THE SEVENTH QUESTION IS WHETHER

THE EIGHTH QUESTION IS WHETHER

THE NINTH QUESTION IS WHETHER

THE TENTH QUESTION IS WHETHER

THE ELEVENTH QUESTION IS WHETHER

THE TWELFTH QUESTION IS WHETHER

THE THIRTEENTH QUESTION IS WHETHER

THE FOURTEENTH QUESTION IS WHETHER

THE FIFTEENTH QUESTION IS WHETHER

THE SIXTEENTH QUESTION IS WHETHER

THE SEVENTEENTH QUESTION IS WHETHER

THE EIGHTEENTH QUESTION IS WHETHER

THE NINETEENTH QUESTION IS WHETHER

THE TWENTIETH QUESTION IS WHETHER

accused defendant's rights under the Fifth Amendment of the United States Constitution are violated when a state trial court requires him to stand trial on an indictment which the Court has allowed the prosecution to amend, at trial, to include for the first time an essential element of the charged crime, to wit, the mens rea element of recklessness, where:

- (a) such element had not been presented to the Grand Jury as an essential element of the charged crime and
- (b) that essential element was not found by and was not returned by the the Grand Jury in its indictment.

This action by the state trial court, affirmed by the Ohio Court of Appeals and review of which was denied by the Ohio Supreme Court, presents, therefore, important reasons for review by this Court, to wit: the state court has decided an important question of federal law involv-

ing the Fifth Amendment of the Constitution of the United States which question should be settled by this Court, or in the alternative, the state decision is in conflict with the applicable decision of this Court.

2. The second question presented is whether an accused defendant's rights under the Sixth and Fourteenth Amendments of the United States Constitution are violated when a state trial court refuses to produce prior Grand Jury testimony of the State's key witnesses who are also identified to testify at trial, when defense counsel requests such information to be produced for an in-camera inspection after the witnesses' direct testimony at trial, and in order to determine if impeachment or exculpatory material exists for use in cross-examination, especially when defense counsel shows that the need for secrecy of the prior Grand

Jury testimony is moot and when defense counsel articulates a particularized need for the production.

On this second issue, the state courts have decided important federal questions involving the Sixth and Fourteenth Amendments of the United States Constitution which questions should be settled by this Court, or in the alternative, the state decision is in conflict with applicable decisions of this Court.

B. QUESTION ONE

The Fifth Amendment to the United States Constitution provides, in part,

No person shall be held to answer for a capital case or otherwise infamous crime unless on a presentment or indictment of a Grand Jury.

Article I, Section 10 of the Ohio Constitution has incorporated the exact language of the above referenced part of the Fifth Amendment. (Appendix I).

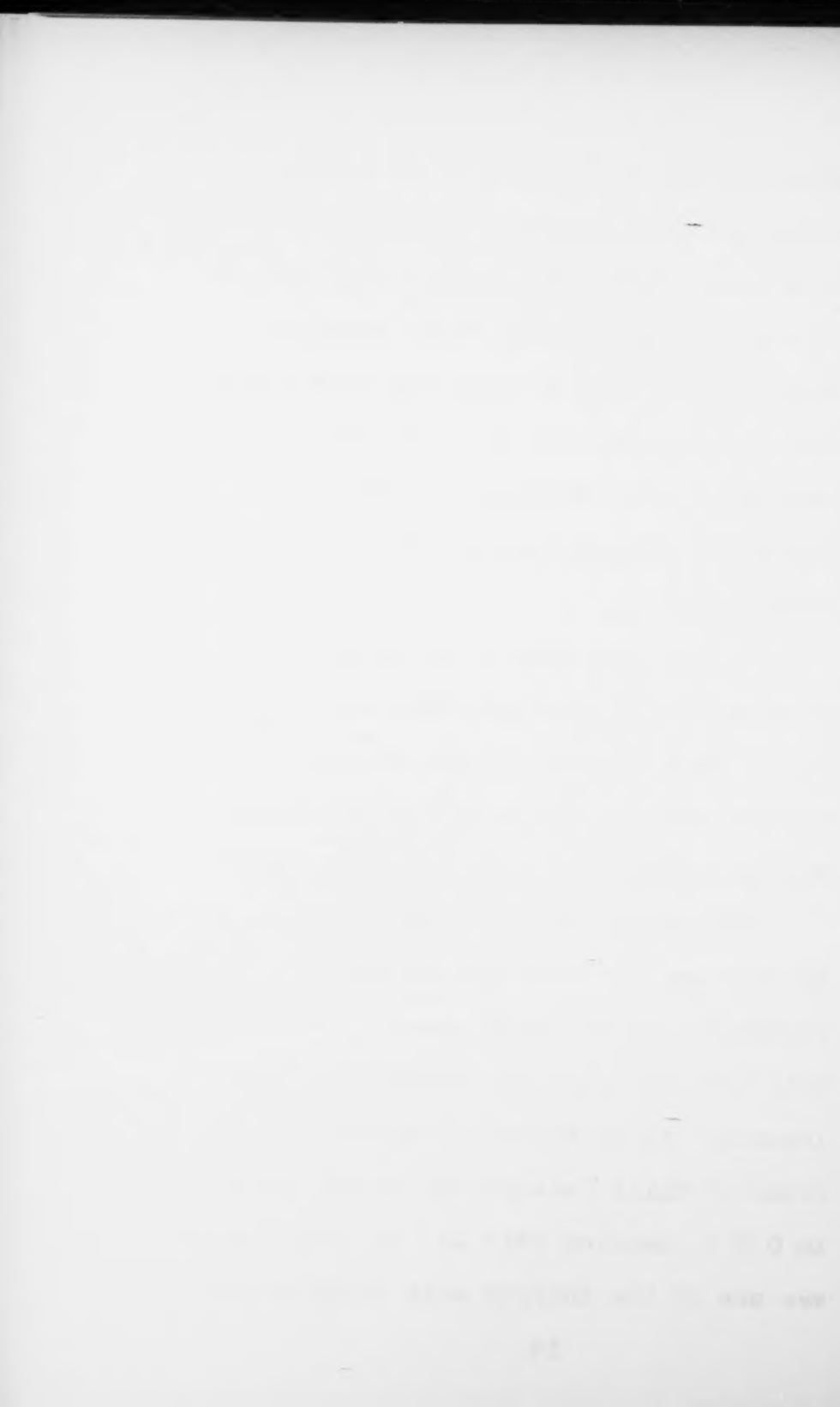
It has long been held that an accused



should stand trial only on an indictment which has been properly found and returned by a Grand Jury. This Court held that it is a basic fundamental right to allow only a Grand Jury to find and return the indictment which charges a defendant and upon which that defendant stands trial. Stirone v. United States, 361 U.S. 212, (1960).

It has long been held in Ohio that in order for a criminal indictment to be valid, each element of the offense charged must be stated in the indictment. Harris v. State, 125 Ohio St. 257 (1932).

Examining the statutory framework in Ohio and the case law interpreting that framework, it has been clearly held in Ohio that the mens rea element of "recklessness" is an essential element of the crime of Child Endangering as set forth in O.R.C. Section 2919.22, et. seq., which was one of the charges with which petiti-



oner was charged in this case. O.R.C. 2901.21 (B); State v. Adams, 62 Ohio St. 2d 151 (1980); State v. O'Brien, 30 Ohio St. 3d 122 (1987).

Prior to the Ohio Court's analysis in O'Brien, supra, the law in Ohio clearly held that when an indictment failed to include an essential element of the offense charged, it was fatally flawed and must be dismissed. State v. Wozniak, 172 Ohio St. 517 (1961); Harris v. State, supra; State v. Headley 6 Ohio St. 3d 475 (1983). In O'Brien the Court found that recklessness was an essential element of the crime of Child Endangering; that failure to include that essential element in the indictment rendered it defective; and that allowing an amendment to add that element was a substantive change to the indictment. Notwithstanding these findings and relying on Ohio Rules of Criminal Procedure 7(D), which allows for the Court

to make amendments to an indictment any time before, during or after a trial, in form or substance, provided no change is made in the name or identity of the crime charged, the Court ruled that allowing the amendment of the indictment to add the essential element of "recklessness" was not violative of the Ohio Constitution, Ohio Statutes nor the United States Constitution. This was done over the dissent of two of the justices.

The constitutional question which is posed by the Ohio trial court and appellate courts' actions in this Court is obvious. Does the Constitution permit a state trial court to ignore the express language of its own Constitution and the provisions of the Fifth Amendment to the United States Constitution and the due process guarantee of the Fourteenth Amendment to the United States Constitution, and all prior case law on the subject.



and usurp the Grand Jury's authority in picking and choosing the times and circumstances wherein it will allow substantive amendments to a criminal indictment? This

Court as well as other courts have tended to discourage such an invasion of the Grand Jury function by a trial court.

The courts have, generally, reasoned that it is a basic fundamental right to allow the Grand Jury to find the indictment, not the trial court and to allow the trial court to substantively amend indictments is to erode the very Grand Jury system.

Stirone, supra; United States v. Denmon,

483 F.2d 1093 (CA8 1978). The Denmon

Court went on to say that the proper test to use in such a case is not a fairness test, that is whether or not after substantively amending an indictment the defendant is still on notice as to the crime charged and is, therefore, not unfair, but the proper test is simply



whether or not a Fifth Amendment violation has occurred in finding that the indictment on which the defendant was charged and on which he is required to stand trial was defective or not defective. If the indictment is defective, then it should be dismissed.

This was the position taken by the dissenting justices in the O'Brien case in Ohio although the majority seemed to employ a fairness test, in its final analysis.

Petitioner urges that, using the Fifth Amendment analysis, it is clear that the original indictment on which petitioner was charged was fatally flawed and should have been dismissed and that he should not have been required to stand trial on the same. Petitioner further urges that even using the fairness test in the law enunciated by the majority in the O'Brien case, he should not have been



required to stand trial on the indictment.

Criminal jurisprudence has always required and Ohio law requires, that before a person can be convicted of an offense he must have committed a voluntary act or omission, and he must have the requisite degree of criminal culpability combined with the act. [O.R.C. 2901.21 (A) (2)]. (Appendix G).

The law does not convict a person of innocent actions even though they might have caused harm.

The essence of petitioner's defense was that he was attempting to rescue his son, and if, in fact, any harm was done to his son by the petitioner that caused the son's death, it certainly was done accidentally or in the series of actions taken by the petitioner to try to save his son's life. These facts were the very essence of his defense.

This evidence was never considered

in light of the mens rea element of recklessness by the Grand Jury who found the original indictment and, therefore, he was prejudiced by having to stand trial on the fatally flawed, although amended, indictment at trial, especially since it is likely that the Grand Jury would not have returned the indictment had they properly been charged on the law.

Further evidence that petitioner was prejudiced by standing trial on this indictment is seen by examining a question which the jury posed to the Court after five hours of deliberation and a new instruction which was given by the trial judge in response to that question.

After approximateley five hours of deliberation, the jury posed the following question to the Court: "We want explained to us, the jury, if and/or the verdict has to be the same on each charge."

After discussion in chambers, and



over defense counsel's objection, the trial judge gave the following new instruction:

'As I instructed you earlier, before you can find the defendant guilty of Involuntary Manslaughter, you must find that he caused the death of his son, Carl Michael Forrester, Jr., as a proximate result of his committing the felony offense of Endangering Children. If you determine, under my earlier instructions, that the evidence is such that the defendant is guilty of Involuntary Manslaughter, you should go on to consider whether the defendant is also guilty of Endangering Children. However, if you determine that the defendant is not guilty of Child Endangering, then you must also find the defendant not guilty of Involuntary Manslaughter as well. If, as a result of the instructions I have given you, you have further questions, you can submit them to the court in writing. At this time you will retire again and consider your verdict.'

It seems clear that the jury was strongly considering defendant's defense that his actions were innocent. It also seems clear that the jury was considering a finding of guilty as to the crime of



Child Endangering and finding of not guilty as to the charge of Involuntary Manslaughter. Also, as can be seen by examining the language of Count I (Appendix F), the offense of Child Endangering was inextricably entwined with the the charge of Involuntary Manslaughter and an essential finding to be made by the jury in order to find the defendant guilty of Involuntary Manslaughter.

The Court's instruction, as evidenced by the ultimate verdict of guilty as to both counts, seems to bear this out and illustrate that Count II of the indictment, which was the defective portion of the indictment, was the focus of the jurys' attention during deliberations, and, therefore, demonstrates precisely the prejudice suffered by petitioner in the Court's failure to dismiss the indictment prior to the trial.

Therefore, under the Q'Brien fair-



ness test, petitioner argues the indictment should still have been dismissed since he demonstrated prejudice by allowing the amendment of the same.

Petitioner asks this Court to consider this serious constitutional question and resolve whether Ohio's practice of allowing a trial judge to substantively amend an indictment to add an essential element of the offense and require the defendant to stand trial thereon, violates the provisions of the United States and Ohio Constitutions requiring a defendant to stand trial only on an indictment found by a Grand Jury.

C. QUESTION TWO

The Sixth Amendment to the United States Constitution provides, in part,

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...to be confronted with the witnesses against him; to have compulsory process for obtaining



witnesses in his favor, and to have the assistance of counsel for his defense.

Article I, Section 10 of the Ohio Constitution substantially provides the same provision regarding the right of a criminal defendant to confront the witnesses against him.

These provisions of the United States Constitution also apply to the State through the Fourteenth Amendment.

Petitioner urges that the state trial court violated his right to confront witnesses and to due process of law pursuant to the federal Constitution, by limiting the effective cross-examination of the State's key witnesses, when it refused to order the transcription and production of the prior Grand Jury testimony, for an in-camera inspection, of those key State witnesses who testified at trial, prior to cross-examination to determine if their prior



testimony contained any impeachment or exculpatory material which would corroborate defendant's innocence and/or exculpate him regarding guilt or punishment.

The standard applied by the Ohio trial court was generally the test enunciated in State v. Greer, supra, which provides for the production of said Grand Jury information upon a showing of particularized need and upon a showing that the particularized need outweighed the need for secrecy.

This generally parallels the federal standard as enunciated by this Court in Dennis v. United States, 384 U.S. 855 (1966) and is generally required as to materials to be produced pursuant to the authority of Brady v. Maryland, 373 U.S. 83 (1963) and pursuant to the authority of 18 U.S.C. Section 3500, or more commonly referred to as the Jencks Act.

Petitioner asserts that the trial

court's arbitrary refusal to produce the requested transcripts for an in-camera inspection violated his right to effectively cross-examine the State's key witnesses and determine if exculpatory material was available therein. Petitioner further argued and the State generally agreed that there was no need for secrecy surrounding the prior testimony, inasmuch as, the same witnesses that testified at the prior proceeding were now coming forward to testify at the trial and that the prior Grand Jury proceeding had completely terminated and there would be no chilling effect as to the testimony of those witnesses.

Petitioner further argued that he had articulated a particularized need for the transcripts inasmuch as:

a) the nature of this case involved unusual medical and factual issues regarding and surrounding the death of his in-

fant son;

b) that since the need for secrecy no longer existed, the need for use of the transcripts in preparing for an effective cross-examination in order to insure the defendant a fair trial was a sufficient showing of a particularized need that far outweighed any need for secrecy, and

c) the fact that the Grand Jury had returned a defective indictment, in that they left out an essential element of the offense, demonstrated a particular need to see the information requested.

Petitioner concedes, as has developed with the federal analysis, that any production of Grand Jury materials, must be done discreetly and limitedly. Dennis, supra.

However, in the circumstances enumerated above in this case, petitioner urges, that the trial court's arbitrary suppression and exclusion of the requested mate-



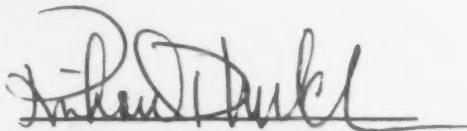
rials, especially only for an in-camera inspection to determine if produceable information existed, violated this petitioner's Sixth and Fourteenth Amendment rights to fully confront and cross-examine witnesses against him and to have a fair trial. Petitioner asserts that there was absolutely no substantial policy or legal reason for the Court to withhold ordering the production of the requested materials for an in-camera inspection.

It is clear that the State of Ohio seems to be arbitrarily placing the value of secrecy above a criminal defendant's constitutional right to full confrontation of the witnesses testifying against him.

Petitioner respectfully asks this Court to grant Certiorari in this case to review the actions of the Ohio trial court under the particular facts and circumstances of this case to determine if petitioner's fundamental constitutional



rights were violated and abridged by the trial court's actions, which were affirmed by the Ohio Court of Appeals and review of which was denied by the Ohio State Supreme Court.

A handwritten signature in dark ink, appearing to read "Richard D. Welch", written over a horizontal line.

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IN THE COURT OF COMMON PLEAS
OF MORGAN COUNTY, OHIO

STATE OF OHIO
PLAINTIFF

VS.

CASE NO.: CR-87-09

CARL MICHAEL FORRESTER
DEFENDANT

ENTRY

This matter came before the Court on March 21, 22, and 23, 1988, for a jury trial. Defendant was present in Court with his attorney, Richard D. Welch. The State was represented by Prosecuting Attorney, Richard L. Ross.

After hearing evidence, the matter was submitted to the jury on March 23, 1988 and on March 23, 1988 the jury returned a verdict of guilty to Count I of the Indictment being Involuntary Manslaughter in violation O.R.C. Section 2903.04 and to Count II of the Indictment being Child Endangering in violation of O.R.C. Section 2919.22. The Defendant was advised of his rights to ap-

peal pursuant to Criminal Rule 32 and Richard D. Welch was appointed as his attorney for any appeal which he wishes to pursue.

The Court ordered a presentence investigation and ordered the Defendant taken into custody pending the return of the presentence investigation and the sentence in this matter.

Due to a disturbance in the Court, the Court found Jeffrey Forrester in contempt of Court and sentenced him to three hours in the Morgan County Jail.

William Safranek, Judge

Richard L. Ross, Prosecuting Attorney

Richard D. Welch, Attorney for Defendant



IN THE COURT OF COMMON PLEAS
OF MORGAN COUNTY, OHIO

STATE OF OHIO
PLAINTIFF

VS.

CASE NO.: CR-87-09

CARL MICHAEL FORRESTER, SR.
DEFENDANT

ENTRY

This matter came before the Court on June 8, 1988 for sentencing. Defendant was present in Court with his Attorney Richard D. Welch. The state was represented by Prosecuting Attorney, Richard L. Ross.

The charge of Involuntary Manslaughter in violation of O.R.C. Section 2903.04 an aggravated first degree felony and Child Endangering in violation of O.R.C. Section 2919.22 a second degree felony being in this case crimes of similar import, the Court asked the Prosecutor to elect and the Prosecutor elected to have the Defendant sentenced on Count I of the In-

dictment being Involuntary Manslaughter in violation of O.R.C. Section 2903.04 an aggravated first degree felony.

After hearing statements from Counsel and the Defendant and considering O.R.C. Section 2929.12, the Court sentenced the Defendant to five to twenty-five (5 to 25) years in a State Penal Institution and assessed the costs to the Defendant. Attorney Richard D. Welch was reappointed as Defendant's Counsel for appeal and the Court set bond at \$10,000 cash pending the appeal.

William Safranek, Judge

Richard L. Ross, Prosecuting Attorney

Richard D. Welch, Attorney for Defendant



COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	JUDGES:
Plaintiff-	Hon. Norman J. Putman, P.J.
Appellee	Hon. John R. Milligan, J.
	Hon. Irene B. Smart, J.

-vs-

CARL MICHAEL FORRESTER	
Defendant-	Case No. CA-88-7
Appellant	

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal
from the Court of
Common Pleas Case
No. CR-87-09

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-
Appellee

For Defendant-
Appellee

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MILLIGAN, J.

**INVOLUNTARY MANSLAUGHTER, R.C.
2903.04 - CHILD ENDANGERING, R.C.
2919.22 - WEIGHT OF EVIDENCE -
CIRCUMSTANTIAL EVIDENCE,
THEORY OF INNOCENCE**

A Morgan County Common Pleas Court jury found appellant guilty of involuntary manslaughter, R.C. 2903.04, and child endangering, R.C. 2919.22.

- Appellant assigns the following as error:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT PREJUDICIALLY ERRED BY FAILING TO GRANT DEFENDANT'S MOTION FOR A DIRECTED VERDICT SINCE THE STATE ['S CASE] IN CHIEF WAS BASED SOLELY ON INADMISSIBLE, CIRCUMSTANTIAL EVIDENCE.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT PREJUDICIALLY ERRED BY GIVING AN "ALLEN TYPE" JURY INSTRUCTION WHICH CAUSED JURY PREJUDICE, BIAS AND CONFUSION WHICH FURTHER DENIED DEFENDANT DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

ASSIGNMENT OF ERROR NO. III

DEFENDANT-APPELLANT'S CONVICTION, UPON THE EVIDENCE INTRODUCED AT TRIAL, WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND MUST BE REVERSED.



ASSIGNMENT OF ERROR NO. IV

THE TRIAL COURT PREJUDICIALLY ERRED BY ADMITTING CERTAIN CHARACTER TYPE EVIDENCE OF THE DEFENDANT AT TRIAL, WHICH WAS INADMISSIBLE AND IMPROPER UNDER THE OHIO RULES OF EVIDENCE AND WHICH VIOLATED DEFENDANT-APPELLANT'S FIFTH AMENDMENT RIGHTS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

ASSIGNMENT OF ERROR NO. V

THE MISCONDUCT OF THE PROSECUTOR AT TRIAL RESULTED IN JURY CONFUSION, BIAS AND PREJUDICE TO DEFENDANT-APPELLANT AND DENIED DEFENDANT-APPELLANT DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

ASSIGNMENT OF ERROR NO. VI

THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO GRANT DEFENDANT'S MOTION TO DISMISS THE INDICTMENT BECAUSE IT WAS DEFECTIVE.

ASSIGNMENT OF ERROR NO. VII

THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION FOR AN IN-CAMERA INSPECTION OF WITNESS'S [SIC] PRIOR STATEMENTS FROM GRAND JURY TESTIMONY AND THEREBY LIMITED DEFENDANT-APPELLANT COUNSEL'S CROSS-EXAMINATION RESULTING IN A VIOLATION OF DEFENDANT-APPELLANT'S SIXTH AMENDMENT RIGHT OF FULL CONFRONTATION OF OPPOSING WITNESSES UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF OHIO.

I

Consistent with our responsibilities as articulated in State v. Kulig (1974), 37 Ohio St.2d 157, 309 N.E.2d 897, we have examined the evidence in this cause and conclude there was sufficient evidence on each of the elements of the crime to sustain a finding of guilt beyond a reasonable doubt. The jury did not stray from its responsibility to properly weigh the circumstantial evidence against the hypothesis of innocence. State v. Shepard (1956), 165 Ohio St. 293, 135 N.E.2d 340.

As appellee points out:

...in the disputed fact as to whether the child was struck or whether a helpful parent shook the child, the jury chose to believe the credibility of Dr. Tate and to disbelieve the credibility of the Defendant. Dr. Tate did state within a reasonable medical certainty that the child had died due to blunt force trauma to the head. This was irreconcilable with any reasonable theory of the

Defendant's innocence.

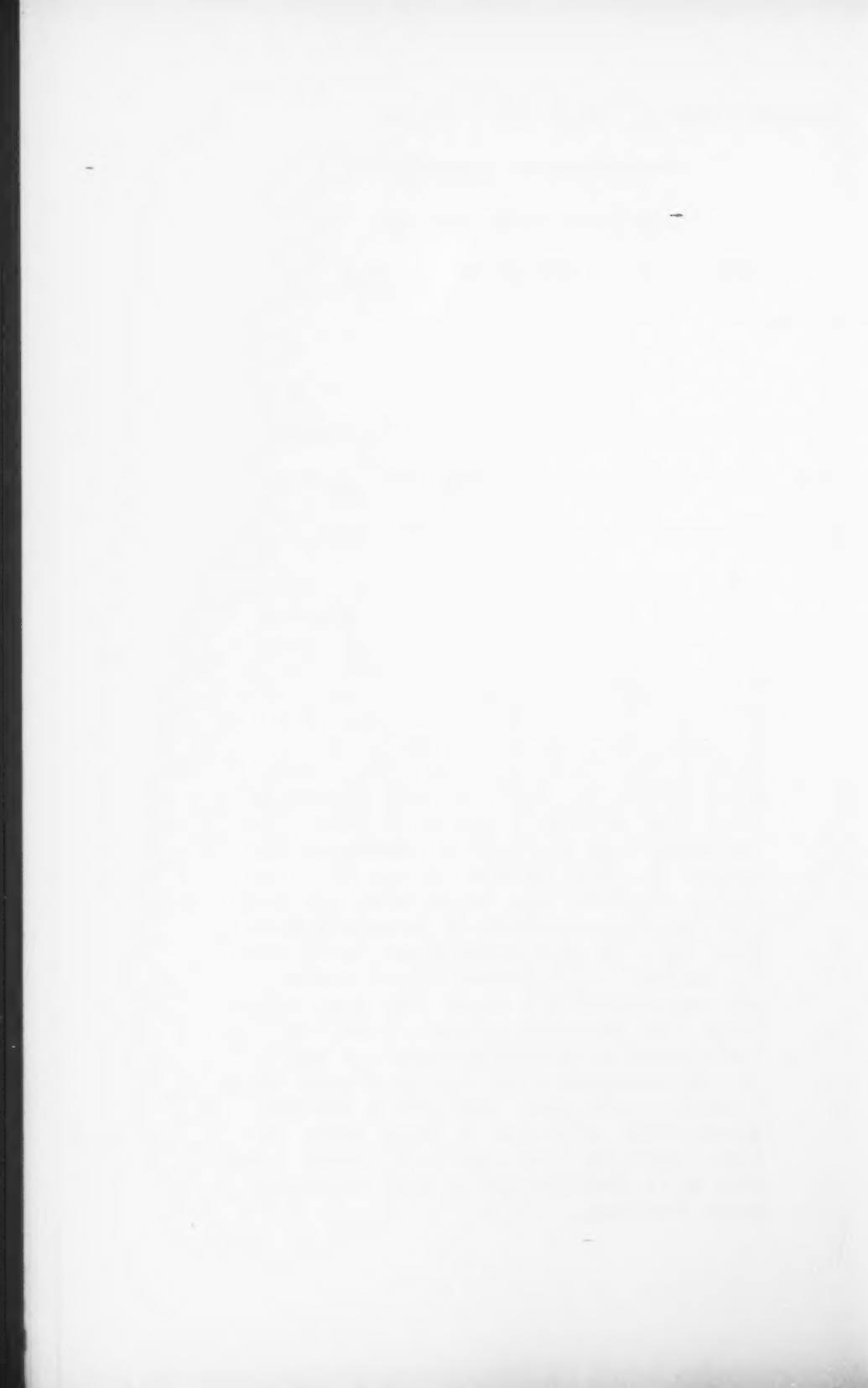
Appellee's Brief, pp. 4, 5.

The first assignment of error is over-ruled.

II

After several hours of deliberation, the court was requested by the jury to give a clarifying instruction. The court stated:

As I instructed you earlier, before you can find the defendant guilty of involuntary manslaughter, you must find that he caused the death of his son Carl Mike Forrester, Jr. as a proximate result of his committing the felony offense of endangering children. If you determine under my earlier instructions that the evidence is such that the defendant is guilty of endangering children, you should go on to consider whether the defendant is also guilty of involuntary manslaughter. However, if you determine that the defendant is not guilty of endangering children, then you must also find the defendant not guilty of involuntary manslaughter, as well. If, as a result of the instructions I have given you, you have further questions, you can submit them to the Court in writing. At this time, you will retire again and consider your verdict.



T. 574.

The claim that this is an "Allen type" instruction and violates the defendant's Sixth Amendment, U.S. Constitution, rights is disingenuous.

We find no error in the instruction given by the trial judge.

The second assignment of error is overruled.

III

For the reasons articulated in the ruling on the first assignment of error, we overrule the third assignment of error.

IV

Appellant postulates error on the admission of testimony relative to the failure of either parent to accompany the child to the emergency room; the fact that open beer cans were found in the apartment at the time of the death; and that the appel-



lant was drinking beer the day after his child's death. He also objects to the admission of testimony that his wife handled the care of the son.

We find no violation of Evid. R. 402 or any provision of the Ohio or Federal Constitution by the admission of this evidence.

The fourth assignment of error is overruled.

v

In voir dire, the State inquired of prospective jurors their attitudes concerning discipline of children, and questioned them about child abuse in the context of these charges.

We have examined the allegations of prosecutorial misconduct and find none.

The fifth assignment of error is overruled.



VI

We overrule the sixth assignment of error upon the authority of State v. O'Brien (1987), 30 Ohio St.3d 122, 508 N.E.2d 144.

VII

Appellant seeks participatory in-camera inspection of State witnesses' Grand Jury testimony.

Deliberations of the grand jury and the vote of any grand juror shall not be disclosed... A grand juror...may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

Crim. R. 6(E).

Recorded testimony of the defendant or a co-defendant before a Grand Jury may also be the subject of discovery. Crim. R. 16(B) (1) (111).

In the case sub judice, the appellant



demonstrated no particularized need for an examination of the Grand Jury testimony of the witnesses. State v. Greer (1981), 66 Ohio St.2d 139, 420 N.E.2d 982.

State v. Daniels (1982), 1 Ohio St.3d 69, 437 N.E.2d 1186, deals with statements made to a law enforcement officer and is inapposite to the issue involving testimony before the Grand Jury.

The seventh assignment of error is overruled.

The judgment of the Morgan County Common Pleas Court is affirmed.

Putman, P.J. and

Smart, J. concur.

JUDGES

JRM/emc

0605 0606



IN THE COURT OF APPEALS FOR
MORGAN COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-
Appellee

-vs-

JUDGMENT ENTRY

CARL MICHAEL FORRESTER
Defendant-
Appellant

CASE NO. CA-88-7

For the reasons stated in the Memo-
randum-Opinion on file, the judgement of
the Court of Common Pleas, Morgan County,
Ohio, is affirmed.

JUDGES



The Supreme Court of Ohio

1989 TERM

To wit: October 4, 1989

State of Ohio,
Appellee,

Case No. 89-1458

v.

E N T R Y

Carl Michael Forrester,
Appellant.

Upon consideration of the motion for leave to appeal from the Court of Appeals for Morgan County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, \$20.00, paid by Shawn
Ruben.

(Court of Appeals No. CA887)

THOMAS J. MOYER
Chief Justice



OHIO REVISED CODE

2919.22 Endangering Children

(B) No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:

(3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child;



INDICTMENT

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that on or about the 26th day of December, 1987, at Morgan Township, Morgan County, Ohio,

Carl Michael Forester, Sr. did cause the death of another, to wit: his son, Carl Michael Forester, Jr., age 3 months, as a proximate result of the offender's committing or attempting to commit the felony of Child Endangering. The Grand Jurors further find and specify that during the commission of the offense that Carl Michael Forester, Sr., caused physical harm to Carl Michael Forester, Jr., in violation of Ohio Revised Code Section 2903.04, aggravated first degree felony.



COUNT II

On or about December 26th, 1987 at Morgan Twp., Morgan Co., Ohio, Carl Michael Forester, Sr., did administer corporal punishment or other physical disciplinary measure in a cruel manner or for a prolonged period to his son, Carl Michael Forester, Jr., age 3 months, which punishment, discipline or restraint was excessive under the circumstances and created a substantial risk of serious physical harm to the child. The Grand Jurors further find that during the commission of the offense, that Carl Michael Forester, Sr., caused physical harm to Carl Michael Forester, Jr., in violation of Ohio Revised Code Section 2919.22, a second degree felony.



OHIO REVISED CODE

2901.21 Requirements for criminal liability.

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;

(2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

(B) When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.



OHIO RULES OF CRIMINAL PROCEDURE

RULE 7. The Indictment and the Information

(D) **Amendment of indictment, information or complaint.** The court may at any time before, during, or after a trial amend the indictment, information, complaint or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information or complaint, or to cure a variance between the indictment, information or complaint and the proof, the accused is entitled to a discharge of the jury on his motion, if a jury has been impanelled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this subdivision, jeopardy shall not attach to the offense charged in the amended indictment, information or complaint. No action of the court in refusing a continuance or postponement under this subdivision is reviewable except after motion to grant a new trial therefore is refused by the trial court, and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court finds that



a failure of justice resulted.

RULE 16. Discovery and Inspection

(C) Disclosure of evidence by the defendant.

(1) Information subject to disclosure.

(d) In camera inspection of witness' statement. Upon completion of the direct examination, at trial, of a witness other than the defendant, the court on motion of the prosecuting attorney shall conduct an in camera inspection of the witness' written or recorded statement obtained by the defense attorney or his agents with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist the statement shall be given to the prosecuting attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the prosecuting attorney, and he shall not be permitted to cross-examine or comment thereon.

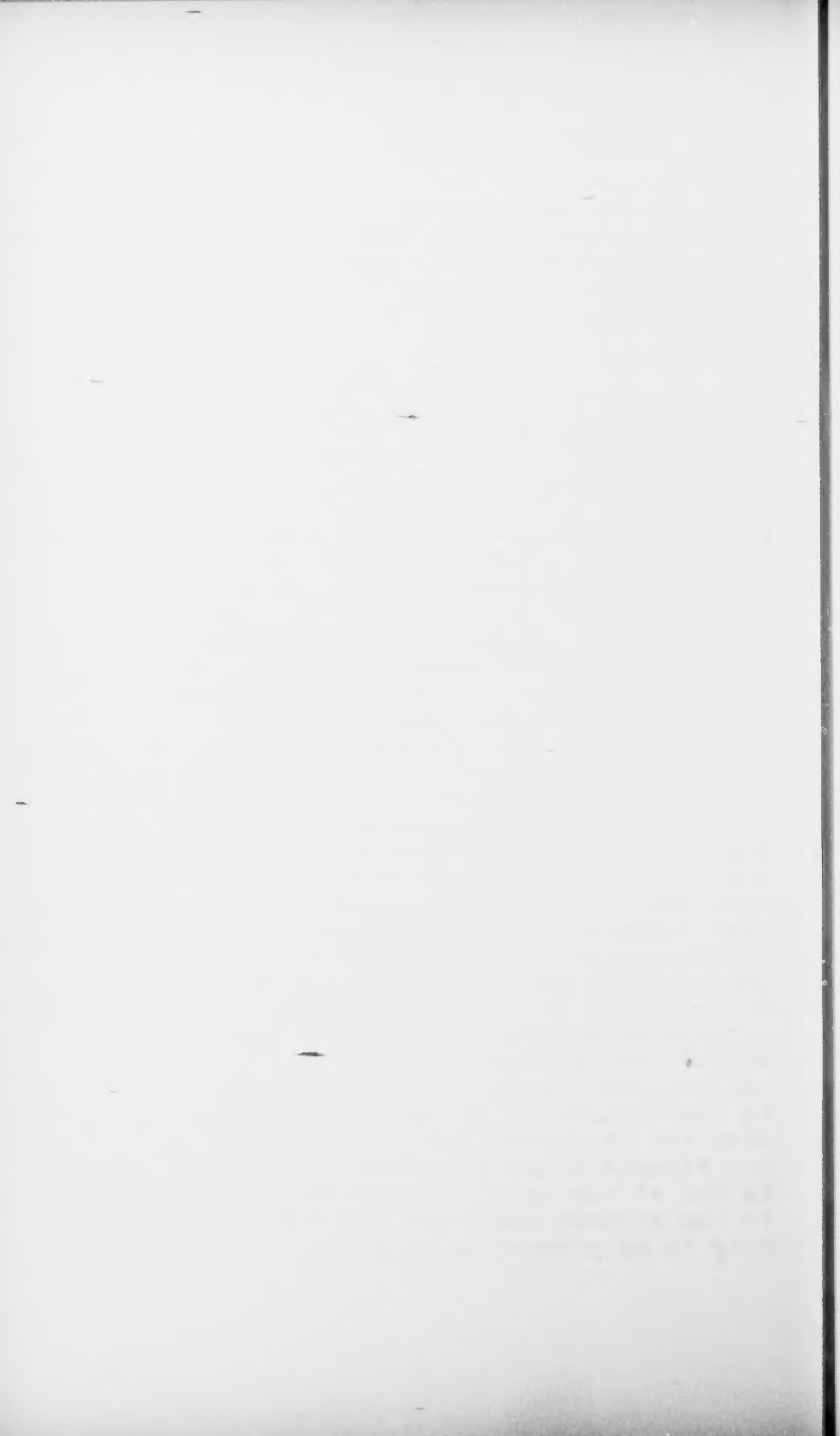
Whenever the prosecuting attorney is not given the entire statement it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.



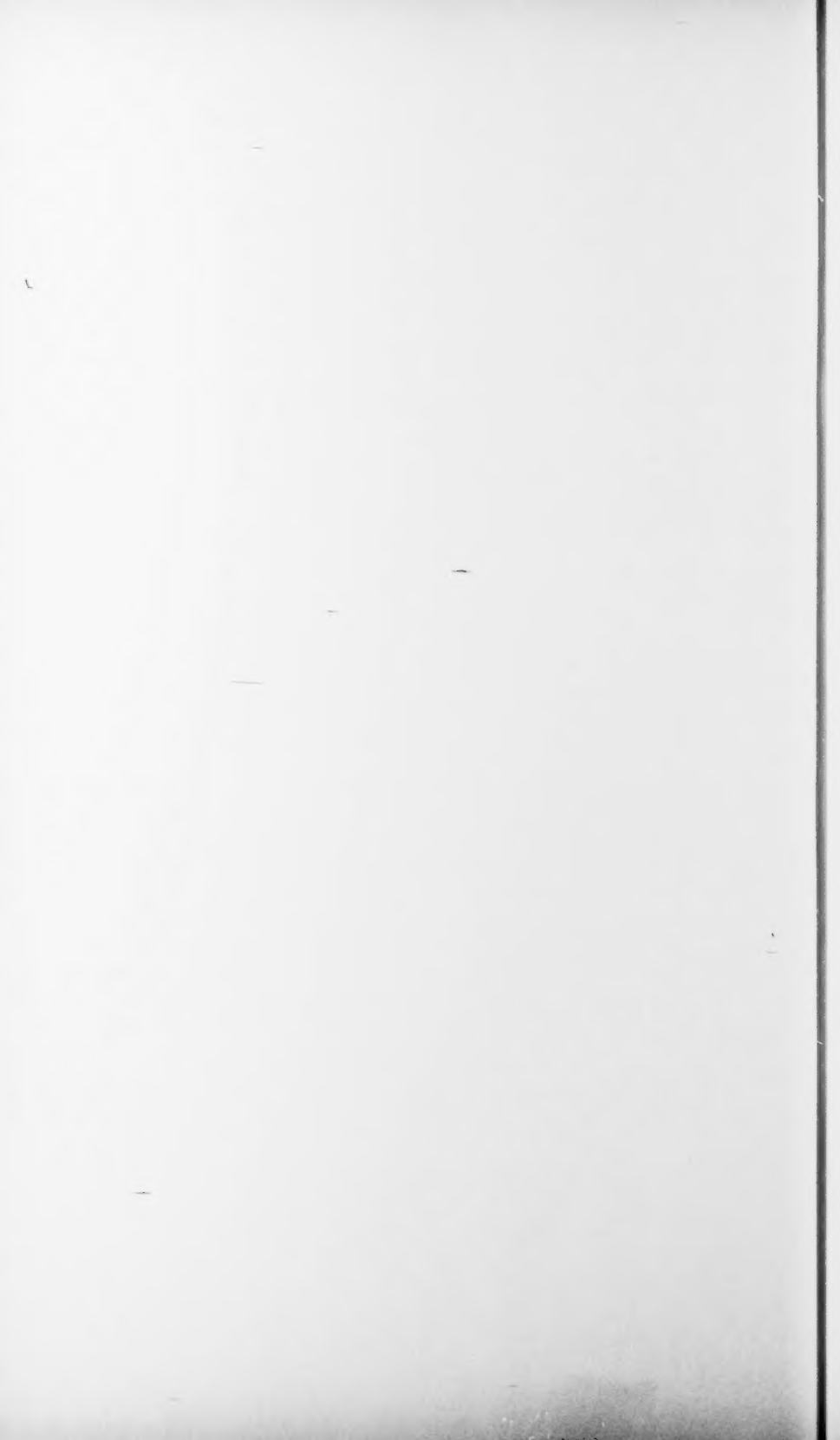
CONSTITUTION OF OHIO

ARTICLE I, Section 10 [Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases.]

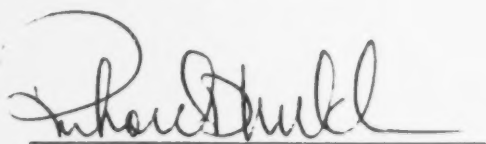
Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with



counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

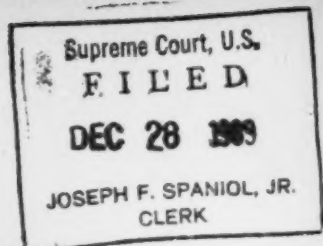


Three copies of the foregoing petitioner's
Petition for Writ of Certiorari to the United
States Supreme Court was served upon the
Respondent, State of Ohio, by mailing a copy
of the same by United States mail, first
class, postage prepaid, this 1st day of
December, 1989 to Mr. Richard L. Ross,
Prosecuting Attorney for Morgan County, Ohio,
P.O. Box 338, McConnelsville, OH 43756,
Counsel for Respondent, State of Ohio.

A handwritten signature in dark ink, appearing to read "Richard D. Welch", is written over a horizontal line.

RICHARD D. WELCH,
Attorney for Petitioner
Grieser, Schafer, Blumenstiel
& Slane Co., L.P.A.
261 West Johnstown Road
Columbus, OH 43230
(614) 475-9511
(614) 475-0348 FAX

2
No. 89-904



IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARL MICHAEL FORRESTER, SR.,
Petitioner,

v.

THE STATE OF OHIO,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO**

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD L. ROSS
Prosecuting Attorney
Counsel of Record
70 W. Main Street
P.O. Box 388
McConnelsville, Ohio 43756
614/962-6478

Counsel for Respondent

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1953

CARL MICHAEL FORRESTER, SR.

Respondent

THE STATE OF OHIO

Appellant

PETITION FOR WRIT OF HABEAS CORPUS TO THE
SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

PAUL C. ROSE

Prosecuting Attorney

Council & Board

of the

P.O. Box 376

McDonoughville, Ohio 43756

61-623-4476

QUESTIONS PRESENTED FOR REVIEW

- I. IN A CASE INVOLVING A STATE FELONY MAY A STATE TRIAL COURT UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION ALLOW THE AMENDMENT OF AN INDICTMENT AT TRIAL WHEN THERE IS NO CHANGE IN THE IDENTITY OR NAME OF THE CRIME CHARGE?
- II. IN A CASE INVOLVING A STATE FELONY, MAY A STATE TRIAL COURT DENY ACCESS TO WITNESS'S GRAND JURY STATEMENTS WHERE THERE HAS BEEN NO SHOWING OF PARTICULARIZED NEED?

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CARL MICHAEL FORRESTER, SR.,

Petitioner,

v.

THE STATE OF OHIO

Respondent.

OPINIONS BELOW

The opinions of the Morgan County Court of Common Pleas, The Court of Appeals for the Fifth Appellate District of Ohio, and of the Ohio supreme Court are adequately set forth in the Petition.

JURISDICTION

Jurisdiction is claimed by the petitioner under 28 U.S.C. 1257(a). However, respondent denies that there is any substantial constitutional question presented.

CONSTITUTIONAL PROVISIONS

The Fifth, Sixth, and Fourteenth Amendments are adequately set forth in the petition.

STATEMENT OF THE CASE

On March 20, 1987, Petitioner was charged by Indictment with child endangering and involuntary manslaughter in the death of his son, Carl Michael Forrester, Jr. In pretrial discovery, Petitioner's counsel requested the transcription and production of the Grand Jury testimony of all witnesses who testified at that proceeding, whether or not they were to be called at trial. Petitioner's counsel argued for the production of all transcripts of all witnesses who appeared before the Grand Jury. The Court denied Petitioner's request finding that a particularized need was not shown except for that of the forensic pathologist, Dr. Larry Tate. Petitioner's counsel did not request any continuance when the Indictment was amended prior to trial to add the element of "recklessness" pursuant to the Ohio Rules of Criminal Procedure. Trial proceeded and Petitioner was convicted on both counts of the the Indictment on March 23, 1988. On June 8, 1988 Petitioner was sentenced to imprisonment for involuntary manslaughter for a period of five to twenty-five (5 to 25) years.

In the Fifth District Court of Appeals for the State of Ohio, both of the assignments of error presented to this Court were overruled. The Court of Appeals found *State v. O'Brien* (1987) 30 O.S. 3d 122 to be expressly controlling concerning the amendment of the Indictment. The Court further found that Petitioner had demonstrated no particularized need for any examination of the Grand Jury testimony of the witnesses. The Court found expressly that the case of *State v. Daniels*, (1982) 1 O.S. 3d 69 was inapplicable as it dealt with statements to a law enforcement officer rather than Grand Jury Testimony.

REASON WHY THE PETITION SHOULD BE DENIED

1. The Indictment was properly amended pursuant to Ohio Law and does not involve a constitutional question.

It is a basic fundamental right to have someone answer only to a felony which has been returned by a Grand Jury. The case of *Stirone v. United States* (1960) 361 U.S. 212 which Petitioner cites is inapplicable. In that case the Defendant was to be tried on conspiracy concerning sand importation but instead was tried concerning steel rather than sand. In the present case Defendant was charged with child endangering and involuntary manslaughter and was tried on child endangering and involuntary manslaughter. The case of *State v. O'Brien* (1987) 30 O.S. 3d 122 governs in this matter. The syllabus in that case reads as follows:

"1. The culpable mental state of recklessly is an essential element of the crime of endangering children under Revised Code 2919.22(b)(3). (*State v. Adams* (1980) 62 O.S. 2d 151; 16 O. Opin. 3d 169; 404 N.E. 2d 144 paragraph 1 of the syllabus approved and followed.)

2. An Indictment, which does not contain all of the essential elements of an offense may be amended to include the omitted element if the name or the identity of the crime is not changed, and the accused has not been misled or prejudiced by the omission of such element from the Indictment. (Crim. R. 7(D) construed and applied.)"

The *O'Brien* court dealt directly with this point.

"Failure to include the element of 'recklessness' in an Indictment for Endangering Children in no way alters

either the name, identity, or severity of the offense charged. "*O'Brien* page 127. The case of *State v. Headley* (1983) 6 O.S. 3d 475 is not applicable. That was a drug offense in which by adding the name of the drug it changed the level of the crime. That particular Ohio Statute would allow possession of a drug to be anything from a minor misdemeanor to a fourth degree felony depending upon the drug possessed. Here the amendment changed neither the identity nor the penalty level of the crime. Likewise the case of *State v. Wozniak* (1961) 172 O.S. 517 is distinguishable. There the words "intent to steal property" were contained in the statute at that time whereas the word "reckless" is not contained in the child endangering statute.

The *O'Brien* case is totally controlling on this matter of State Law. On the matter of Federal Law the Indictment was returned by a Grand Jury and Defendant stood trial on that charge.

As the Court of Appeals stated: "In the disputed fact as to whether the child was struck or whether a helpful parent shook the child, the jury chose to believe the creditability of Dr. Tate and to disbelieve the creditability of the Defendant. Dr. Tate did state within a reasonable medical certainty that the child had died due to blunt force trauma to the head. This was irreconcilable with any reasonable theory of the Defendant's innocence." Wherefore Respondent asks this Court to not grant the writ if there is not serious constitutional question to be reviewed.

Ohio Criminal Rule 7(D) permits amendment of an Indictment as long as there is "no change is made in the name or identity of the crime charge." This has been repeatedly held to past constitutional standards as even

Federal Courts have said that an Indictment may be amended when the Defendant is not misled in any sense, is not subject to any added burden and is not otherwise prejudiced. *United States v. Kegler* (1984) DC) 724 F 2d 190.

2. There is no right to inspect Grand Jury statements of Witnesses.

The providing of Grand Jury testimony is governed not by Criminal Rule 16 for Discovery but is governed by Criminal Rule 6 applying to Grand Jury. The Ohio Rules are very similar although not the same as the Federal Rules. The case of *Dennis v. United States* (1966) 384 U.S. 855 is inapplicable as this Court was there interpreting the Federal Rules of Criminal Procedure as to a "particularized need".

It is obvious that Petitioner's counsel wished discovery, not a particularized need, when he stated (at the transcript, page 313, line 24) "I wanted, obviously, Dr. Tate's for preparation prior to trial." 18 U.S.C.S. Section 3500(e) includes Grand Jury testimony as statements to be given to Defense Counsel after a witness testifies. This is in the Federal definition of statement. There is no such applicable or comparable portion of the Ohio Rules and it is not a constitutional question.

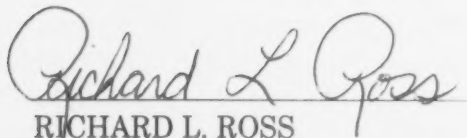
Particularized need is set forth by this Court at a time when the Federal Rules more closely resembled the Ohio Rules of today. *Pittsburg Plate Glass Company v. U.S.* (1959) 360 U.S. 395. The *Jencks* case had to deal with statements in possession of the government not the testimony before the Grand Jury. *Jencks v. U.S.* (1957) 353 U.S. 657. Grand Jury testimony is only to be disclosed if "a compelling necessity shown with particularity" is done

by defense counsel. *U.S. v. Proctor & Gamble Company* (1958) 356 U.S. 677. Here both the Trial Court and the Appellate Court found that there was no particularized need set forth by Petitioner's counsel. There still is a continued need for particularized need before disclosure of Grand Jury testimony. *Smith v. U.S.* (1975) 423 U.S. 1303.

CONCLUSION

For the foregoing reasons, respondent requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

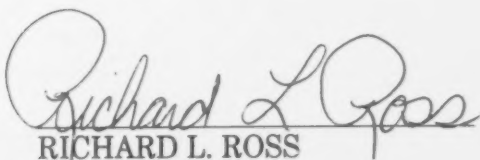
A handwritten signature in cursive script, reading "Richard L. Ross", written over a horizontal line.

RICHARD L. ROSS
Prosecuting Attorney
70 West Main Street
P.O. Box 388
McConnelsville, Ohio 43756
(614) 962-6478

COUNSEL OF RECORD

CERTIFICATE OF SERVICE

Pursuant to Rule 28 of the Rules of Practice of this Court, I, Richard L. Ross, a member of the Bar of this Court, hereby certify that on the 28th day of Dec 1989, three copies of respondent's Brief in Opposition to Petition for Writ of Certiorari in the above entitled case were served upon the petitioner by United States Mail, first class, postage prepaid, addressed to Richard D. Welch, Grieser, Schafer, Blumenstiel & Slane Co., L.P.A. 261 West Johnstown Road, Columbus, Ohio 43230, Counsel of Record for petitioner. I further certify that all parties required to be served have been served.

A handwritten signature in cursive script, reading "Richard L. Ross", written over a horizontal line.

RICHARD L. ROSS
Prosecuting Attorney
70 W. Main Street
P.O. Box 388
McConnelsville, Ohio 47356
(614) 962-6478

Appendix A

Rule 6. The Grand Jury

(A) Summoning grand juries. The judge of the court of common pleas for each county, or the administrative judge of the general division in a multi-judge court of common pleas or a judge designated by him, shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of nine members, including the foreman, plus not more than five alternates.

(B) Objections to grand jury and to grand jurors.

(1) Challenges. The prosecuting attorney, or the attorney for a defendant who has been held to answer in the court of common pleas, may challenge the array of jurors or an individual juror on the ground that the grand jury or individual juror was not selected, drawn, or summoned in accordance with the statutes of this state. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified, if it appears from the record kept pursuant to subdivision (C) that seven or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(C) Foreman and deputy foreman. The court may appoint any qualified elector or one of the jurors to be foreman and one of the jurors to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the num-

ber of jurors concurring in the finding of every indictment and shall upon the return of the indictment file the record with the clerk of court, but the record shall not be made public except on order of the court. During the absence or disqualification of the foreman, the deputy foreman shall act as foreman.

(D) Who may be present. The prosecuting attorney, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session. but no person other than the jurors may be present while the grand jury is deliberating or voting.

(E) Secrecy of proceedings and disclosure. Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosed. Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person before such indictment is filed and the case docketed. The court may direct that an indictment shall be kept secret until the defendant is in custody or has been released pursuant to Rule 46. In that event the clerk shall seal the indictment, the indictment shall not be docketed by name until after the

apprehension of the accused, *and no person* shall disclose the finding of the indictment except when necessary for the issuance of a warrant or summons. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

(F) Finding and return of indictment. An indictment may be found only upon the concurrence of seven or more jurors. When so found the foreman or deputy foreman shall sign the indictment as foreman or deputy foreman. The indictment shall be returned by the foreman or deputy foreman to a judge of the court of common pleas and filed with the clerk who shall endorse thereon the date of filing and enter each case upon the appearance and trial dockets. If the defendant is in custody or has been released pursuant to Rule 46 and seven jurors do not concur in finding an indictment, the foreman shall so report to the court forth with.

(G) Discharge and excuse. A grand jury shall serve until discharged by the court. A grand jury may serve for four months, but the court upon a showing of good cause by the prosecuting attorney may order a grand jury to serve more than four months but not more than nine months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another eligible person in place of the juror excused.

(H) Alternate grand jurors. The court may order that not more than five grand jurors, in addition to the regular grand jury, be called, impanelled and sit as alternate grand jurors. Alternate grand jurors, in the order in which they are called, shall replace grand jurors who, prior to the time the grand jury votes on an indictment, are found to be unable or disqualified to perform their duties. Alternate grand jurors shall be drawn in the same

manner, shall have the same qualifications, shall be subjected to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular grand jurors. Alternate grand jurors may sit with the regular grand jury, but shall not be present when the grand jury deliberates and votes.